

SENATE OF PUERTO RICO



Kenneth D. McClintock¹
President

I appeared before this Subcommittee for the first time 31 years ago, on January 20th, 1976, at the age of 18.² Since then, two things have happened with complete certainty; first, I haven't gotten any younger, and secondly, the argument that I've heard the most to excuse 108 years of Congressional inaction is that the American citizens in Puerto Rico have to speak with one voice to resolve the status dilemma, a standard that hasn't kept you from dealing with other highly divisive domestic issues, such as racial segregation³ -in the past- and, more recently, oil drilling in the ANWR,⁴ the protection of the Everglades⁵ and the very delicate issue of immigration reform.

¹ I have been an at-large Senator from the New Progressive Party since 1993. I'm currently in my fourth term. From 1993 to 2000, I chaired the Committee on Federal and Economic Affairs and from 1994 to 2000 I also chaired the Government Affairs Committee. I served as the first Hispanic Chairman of the Council of State Governments during 1999 and as the second President of the Parliamentary Conference of the Americas in 2000. From 2001 to 2004 I was the Senate Minority Leader and in 2005 became the thirteenth President of the Senate.

² Hearings by the Territorial and Insular Affairs Subcommittee of the Committee on Interior and Insular Affairs, January 20, 1976, San Juan, Puerto Rico. Among numerous other appearances before Congressional committees, I also appeared before the full Committee on Resources of the United States House of Representatives on April 19, 1997 in San Juan, Puerto Rico regarding HR 856, known as the Young Bill.

³ It's a well-known historical fact that when President Lyndon Johnson signed the 1964 Civil Rights Act, he would tell aide Bill Moyers that with a stroke of a pen he had just delivered the South to the Grand Old Party for the foreseeable future. As Senator Barack Obama has noted, President Johnson chose the "right side of the battle", notwithstanding the fact this was, and has been, the most divisive issue our Country has ever faced. Obama, Barack, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM*. Crown Publishers. p. 27, 2006.

⁴ See CRS Issue Brief IB10111, Arctic National Wildlife Refuge (ANWR): Controversies for the 108th Congress, September 29th, 2004.

⁵ See <http://www.americanparknetwork.com/parkinfor/content.asp?catid=85&contenttypeid=14>

As President of the Senate, may I remind you that two years ago, Puerto Rico spoke with one voice when a historic tri-partisan unanimous vote in the Senate was followed by a unanimous vote in the House in favor of a measure⁶, in which every one of Puerto Rico's elected senators and representatives voted for a referendum in which the People of Puerto Rico would ask the Congress to commit to resolve Puerto Rico's status dilemma. Unexpectedly, Governor Acevedo vetoed the bill, after having made the commitment that he would sign it as it was approved.

Since then, the White House issued its report, and, in spite of the Governor's inexplicable veto of the bill, two-thirds of Puerto Rico's Senate supports H.R. 900 and opposes H.R. 1230.

H.R. 900 would provide a "reality check" for Puerto Ricans to choose among the real status options that have support in the territory -- continuing the current territory status, U.S. Statehood, independence, and nationhood in a true free association with the U.S.

The bill is based upon the findings and recommendations of the President's Task Force on Puerto Rico's Status established by President Clinton and comprised of senior appointees of President Bush who consulted with Puerto Rico's leaders and studied the issue anew. They generally agreed with the Clinton Administration on the options.

From the past Co-Chairman of the President's Task Force, Mr. Rubén Barrales, I know that the two-step-choice process was proposed in deference to Gov. Acevedo, who wrongly insisted that the majority of Puerto Ricans had always supported "commonwealth", and who opposed the Puerto Rican people choosing among all the options.

"Commonwealth" is understood in Washington to refer to Puerto Rico's territory status. The evidence is that Puerto Ricans do not support it, but no one can be sure until there is a vote among real options. The only time that the status as it exists was on the ballot -- in 1998 -- it received less than one-tenth of one percent of the vote. Many commonwealthers voted for "None of the Above"

⁶ Substitutive of House Bills 1014, 1034 and 1058

along with many "independentistas"⁷. Commonwealthers did so because they were told by the current Governor that was the way to vote for the "Development of the Commonwealth" proposal. (See the article incorporated into my full statement.⁸) This demonstrated why federal action is needed to clarify the real status options and was the reason that President Clinton agreed to establish the Task Force during a meeting with leaders of all three local parties. In the 1952 referendum, there was no "commonwealth" status option on the ballot. A proposal for a "commonwealth" - different than the present - won the 1967 referendum, but it was rejected by this subcommittee's predecessor. Another proposal for a "commonwealth" different than the present obtained a slight plurality over statehood in 1993, but it was not accepted by the Clinton Administration or congressional leaders. As former Governor Hernández Colón has written, "all factions do agree on the need to end the present undemocratic arrangement"⁹ - and this is illustrated by the status proposals of the three parties and of the faction of the "commonwealth" party that supports free association.

The current political status of Puerto Rico is, without any doubt, subject to the Territorial Clause of the Constitution of the United States. Some "commonwealth" supporters defend the current political status stating that it just needs some development, in the direction to a non-territorial Commonwealth status. Since what they call "commonwealth" is a territorial status, a non-territory "commonwealth" status is by definition an oxymoron.

The fatal flaw of Governor Acevedo's H.R. 1230 is that it includes an impossible proposal as an option and excludes a real status. The excluded real status is free association, which Acevedo opposes but is supported by a growing faction within his party. The impossible proposal is the "commonwealth Status", as the testimony of the Congressional Research Services constitutional expert made clear at the last hearing and was not rebutted by Acevedo's constitutional expert at the hearing.

Repeated statements of Acevedo and his representatives and statements in the "Development of the Commonwealth" proposal itself, as to the purpose of the convention that H.R. 1230 would support, make clear that the non-territory

⁷ Spanish for Pro-Independence voters.

⁸ "PDP unveils commonwealth definition", San Juan Star, October 17, 1998.

⁹ "Doing Right by Puerto Rico: Congress Must Act", *Foreign Affairs*, August 1998.

"commonwealth status" is intended to be Governor Acevedo's "Development of the Commonwealth". This proposal has been rejected as impossible - for constitutional and basic policy reasons - by the Clinton Administration and every Congressional leader who has commented on it, as well as by President Bush's Task Force. Under the proposal, Puerto Rico would be a nation to which the U.S. is permanently bound, with the power to enter into international agreements; but the U.S. would also be permanently obligated to grant a subsidy, in addition to the present one, new incentives for U.S. investment, all current assistance to Puerto Ricans, free entry to any goods shipped from Puerto Rico, and U.S. citizenship. Federal laws would apply and the federal courts would rule but only to the extent agreed to by the local government¹⁰.

Enacting a federal law listing a non-territory "commonwealth status" as an option, when the intent of the proponents is the "Development of the Commonwealth" proposal, would be to invite Puerto Rico to choose as its status preference a proposal that Congress cannot, and would not grant - a cruel hoax.

Another fundamental flaw of H.R. 1230 is that it is designed to result in a "stacked deck" against one of the real options, statehood, and produce an artificial majority for the "commonwealth" nationhood proposal. As stated by local senators who support Gov. Acevedo's proposal,¹¹ the plan is to form a coalition with Pro-independence voters and other nationalists in a convention to outvote statehood delegates. "Independentistas" and other nationalists would probably agree, also knowing that the "commonwealth" proposal would be rejected in Washington, leaving true nationhood as the only option.

H.R. 1230 is also less democratic than H.R. 900. Under H.R. 900, the people would pick Puerto Rico's proposed status. Under H.R. 1230 a convention, likely to be comprised of politicians, would select among the status proposals for the people and the people would only be able to accept or reject the selected proposal. This is intended to corner the people into accepting a proposal that they would otherwise not choose by majority.

¹⁰ See Exhibit 1, "Popular Democratic Party Development of the Commonwealth" approved by the Governing Board of the Popular Democratic Party On October 15, 1998.

The purpose of the "constitutional convention" in H.R. 1230 is different from that of the constitutional conventions Puerto Rico held in the early 1950s, authorized under the Constitution of Puerto Rico, held by the United States, held by the 50 States, and held by all four other populated current territories. The purpose of those constitutional conventions was to organize governments under an already determined political status; the purpose of this "constitutional convention" would be to choose a status.

Finally, as the Congress decides whether to act to dispose of the territory or admit it as a new state, you should ask yourselves for how much longer do you believe that Congress should be empowered to make needful rules and regulations, and keep us as the territory we've been for over a century.

The segregationist vision that permeated the US Supreme Court majority opinion in Plessy versus Ferguson in 1896¹² spilled over into the first of the Insular Cases which suggests that Congress could keep colonies forever.¹³ Justice Harlan, whose dissent in Plessy¹⁴ became the unanimous opinion of the Court in Brown¹⁵, stated in his Insular Case dissent his belief that the Territories Clause of the Constitution was never intended by its anti-colonial drafters to justify 108 years of colonialism¹⁶

¹² 163 U.S. 537 (1896). Plessy is the 1896 case in which the United States Supreme Court declared constitutional the separate and unequal treatment of Afro-American citizens, a case which was later struck down in several contemporary cases, notably Brown v. Board of Education of Topeka, 347 U.S. 483 (1953), which held that separate is inherently unequal.

¹³ The following are known as the Insular Cases: De Luna v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Hung v. New York & Porto Rico Steamship Co., 182 U.S. 392 (1901). For a critical discussion of the colonialist doctrine set forth in the Insular Cases, see Justice Torruella's dissent in Igartua-de la Rosa v. U.S., 417 F.3d. 145, 158-166 (2005).

¹⁴ In Plessy v. Ferguson, *supra*, p. 559, Harlan's dissent stated that "[b]ut in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."

¹⁵ *Supra* Footnote 12.

¹⁶ In Downes v. Bidwell, *supra*, p. 380, Harlan's dissent stated that "[t]he idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere

Which constitutional interpretation do you support today; the segregationists' view that separate-but-equal forever, be it racial or geographical, is constitutional, or Justice Harlan's view that Puerto Rico cannot be treated differently forever?

As Justice Harlan, I believe that the Clause's drafters, who only five years before had won a war against colonialism, never intended for you to continue ruling indefinitely over Puerto Rico as a territory. If you share our belief, inaction is no longer an alternative. The only alternative is to establish a process that will allow you to dispose of the territory of Puerto Rico or admit us into the Union. HR 900 clearly sends Puerto Rico on that path.

Thank you.

colonies or provinces, --the people inhabiting them to enjoy only such rights as Congress chooses to accord to them,--is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution."

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Exhibit 1

POPULAR DEMOCRATIC PARTY

DEVELOPMENT OF THE COMMONWEALTH

The people of Puerto Rico, in the exercise of their sovereignty, their natural right to self government and their free will as ultimate sources of their political power, hereby reaffirm the validity of the Commonwealth established as an autonomous political body, that is neither colonial or territorial, in permanent union with the United States under a covenant that cannot be invalidated or altered unilaterally and proposes its autonomic development. The relationship between Puerto Rico and the United States will continue to be based on common defense, market and currency and on the irrevocability of the U.S. citizenship, acquired by birth and protected by the U.S. Constitution.

This relationship guarantees the autonomous development of Puerto Rico based on the democratic precept of government with the consent of the governed and the recognition that Puerto Rico is a nation with its own history, idiosyncrasy, culture and Spanish language.

To achieve its maximum economic progress and well-being, the people of Puerto Rico propose to develop Commonwealth retaining all the powers that are not delegated to the United States. Under Puerto Rico's fiscal autonomy, economic development areas will be identified in which joint action can produce jobs and other benefits for both parties, including the flexibility in the use of federal funds, providing that programs of direct aid to individuals will continue as they are present. The Commonwealth will be able to enter into commercial and tax agreements, among others, with other countries, and belong to regional and international entities, consistent with the common interests of defense and security between the United States and Puerto Rico, as agreed to in the covenant.

Once the request for the development of the people of Puerto Rico is approved, a Constituent Assembly will be called to negotiate with the U.S. government the terms and conditions of the covenant, which will include a mechanism to approve the application of legislation approved by the U.S. Congress.

ARTICLE I - PUERTO RICAN IDENTITY

A. PUERTO RICAN NATIONALITY

Puerto Ricans have a common history, idiosyncrasy, culture and language that constitute a specific nationality separate from that of any other nation.

B. PUERTO RICAN CITIZENSHIP

Persons born in Puerto Rico are Puerto Rican citizens by birth and their Puerto Rican citizenship is transmittable to their descendants as determined by the Commonwealth and would have the rights, privileges and obligations that derive from it.

ARTICLE II -- BASIS OF THE UNION

The union between Puerto Rico and the United States will continue to be based on the following fundamental elements determined by Puerto Rico freely and in agreement with the United States:

A. COMMON CITIZENSHIP

People born in Puerto Rico will continue to be citizens of the United States by birth and this citizenship will continue to be protected by the Constitution of the United States and by this Covenant and will not be unilaterally revocable.

B. COMMON DEFENSE

The United States will maintain authority and responsibility over defense matters. This will include: the same responsibility for the defense of Puerto Rico and its people as the United States and its people; denying and limiting military or strategic access to Puerto Rico to any foreign power, maintaining the bases or other military installations currently operating in Puerto Rico as well as the National Guard; stipulating that the case of the Municipality of Vieques will be the object of the highest attention in agreement with the legitimate call of its residents; and, any additional need would be considered and dealt with through specific and separate agreements.

C. COMMON CURRENCY

The U.S. dollar is and will continue to be the currency in Puerto Rico.

D. COMMON MARKET

A common market will continue to exist between Puerto Rico and the United States, by which the free flow of goods and services between the two countries will continue.

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ARTICLE III -- DISTRIBUTION OF POWERS

A. SELF GOVERNMENT

The Commonwealth emanates from the power of the people to govern themselves, and for that reason, the people of Puerto Rico retain all the powers that have not been delegated to the United States.

B. DELEGATION OF POWERS

The powers related to the Federal laws related to defense, currency, U.S. citizenship, Social Security, Medicare, unemployment insurance, banks and brokerage, Postal Service and the programs for providing social and educational assistance to citizens and veterans are delegated to the United States. In addition, international relations are delegated to the extent consisted with this Covenant.

C. SHARED POWERS

Areas of special cooperation will be identified in which the United States and the Commonwealth will exercise shared powers for the benefit of both people through the process established in Article XII.

ARTICLE IV -- RIGHTS OF CITIZENS

A. CONSTITUTIONAL RIGHTS

The U.S. citizens residing in Puerto Rico will be protected by all the rights, privileges and immunities granted by the Constitution of the United States and the Commonwealth.

B. ECONOMIC BENEFITS

The Federal programs that provide social and educational assistance directly to Puerto Rico's residents, such as the Nutritional Assistance Program, Pell Grants and educational loans, among others, will continue and be guided by the applicable Federal and State regulations.

The United States recognizes as acquired rights Federal programs for veterans and Social Security, Medicare, and unemployment insurance benefits for which Puerto Rican workers and employers have made and will continue to make the corresponding Federal contributions.

ARTICLE V - ECONOMIC DEVELOPMENT

A. WITH THE UNITED STATES OF AMERICA

To promote Puerto Rico's economic development, and considering the present and future relations between Puerto Rico and the United States, the U.S. commits to provide the Commonwealth an annual block grant adjusted for inflation, so the Government of Puerto Rico can continue to provide social assistance, develop public works and infrastructure, and provide incentives for the creation of jobs and socioeconomic development.

The U.S. and Puerto Rico will identify and agree on areas of economic development in which joint action will produce jobs and other economic benefits for both parties, including the creation of special incentives programs for investment in the islands.

B. INTERNATIONAL

The Commonwealth will have control over international trade and will establish a policy to promote its maximum economic development. To that effect, it will have the capacity to enter into commercial and tax agreements, among others, with other countries, consistent with the common interests of the defense and security of Puerto Rico and the United States.

The Commonwealth will be able to enter into international agreements and belong to regional and international organizations consistent with the common interests of the defense and security of Puerto Rico and the United States.

The United States commits to support the participation or membership of Puerto Rico in the agreements and organizations to which this article refers.

ARTICLE VI - FEDERAL LANDS

The Government of the United States will transfer to Puerto Rico the lands that now it has in Puerto Rico with the exception of those lands that are used for common defense or that are necessary to exercise the powers delegated in this Covenant.

ARTICLE VII -- AREAS OF SPECIAL COOPERATION

Puerto Rico and the United States will establish other areas of special cooperation intended to guarantee the quality of life of Puerto Ricans and to continue nourishing from the collective experiences of institutional and local development of both peoples.

For the sake of an orderly and calm future and development in harmony with the cultural, spiritual, psychological, and economic nature of both peoples, Puerto Rico and the United States commit to jointly determine strategies to: control drug trafficking; regulate communications; protect the borders from illegal immigration; protect the environment and recognize guarantees of mutual benefit consistent with international rules; promote a new basis for cooperation between workers and management; deal with natural disasters; share technological advances in the sectors of agriculture, medicine, pharmacology, criminal justice, and other disciplines in the areas of Natural and Social Sciences and Humanities.

ARTICLE VIII -- FEDERAL COURT

The Federal Court will have jurisdiction over matters that arise from: provisions of the Constitution of the United States and of the Federal laws that apply to Puerto Rico consistent with this Covenant and not in violation with the laws of the Constitution of Puerto Rico. Spanish and English will be the official languages of that court.

ARTICLE IX -- RESOLVING DISPUTES

A. NEGOTIATION COMMITTEE

Any controversy about the interpretation of this Covenant will be resolved through negotiations between the parties to this Covenant that is the United States and the Commonwealth of Puerto Rico. In all negotiations, the Commonwealth of Puerto Rico will be represented by a negotiating committee of three (3) members appointed by the governor and confirmed by seventy-five percent (75%) of each of the two (2) legislative houses of Puerto Rico.

At least, two (2) of the three (3) members of the committee should believe in the political philosophy described in this Covenant, that is, be Commonwealthers. In the same manner, the United States of America will be represented by a committee of three (3) members appointed by the President of the United States

B. COMMISSION TO RESOLVE DISPUTES

If it is not possible to resolve a controversy through a negotiation between the parties, the controversy will be submitted to the Commission to Resolve Disputes. This commission will have five (5) members, two (2) appointed by the Commonwealth of Puerto Rico, two (2) appointed by the United States of America and a fifth member appointed by majority of these four (4). The five (5) members will select a chairman from their membership. Decisions of this Commission in disputes between the Governments of the Commonwealth of Puerto Rico and the United States of America regarding the interpretation of this Covenant will be final and firm.

ARTICLE X - LEGALITY

The agreement between the people of Puerto Rico and the government of the United States of America will have the force recognized by the constitutional and international rights in force as a bilateral covenant that recognizes rights and delegates powers, based on mutual consent that cannot be unilaterally renounced or altered.

ARTICLE XI - SYMBOLS

The symbols, flags and hymns of the Commonwealth of Puerto Rico will continue to be as at present.

ARTICLE XII - OTHER INTERNATIONAL ASPECTS

The Commonwealth of Puerto Rico will retain the authority to ratify cultural, educational, scientific and sports agreements.

ARTICLE XIII - NEGOTIATION

a. Once this development proposal is approved by the people of Puerto Rico, a Constituent Assembly will be called that will negotiate with the Government of the United States the terms and conditions of the association between Puerto Rico and the United States and the specific drafting of such agreement on behalf of the people of Puerto Rico. This Constituent Assembly will not be able to adopt proposals that undermine or cancel the mandate expressed by the people of Puerto Rico or that undermines the precepts of common citizenship, market, currency and defense, or against the Puerto Rican national identity.

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b. The Constituent Assembly will design and propose to the Government of the United States a mechanism for a specific agreement regarding the application of legislation approved by the Congress of the United States after the adoption of the covenant and that the people of Puerto Rico wish to have extended to Puerto Rico. The people of Puerto Rico will elect a Resident Commissioner who will represent Puerto Rico before the Government of the United States and who will be considered a Member of the U.S. House of Representatives for purposes of all legislative matters that have to do with Puerto Rico, but whose role will also be extended to representing Puerto Rico before the Executive Branch of the United States.

c. The main political parties of Puerto Rico will be represented in the Constituent Assembly and will be able to nominate candidates to be part of the assembly.

d. The Covenant will take effect after it has been negotiated and approved by the Government of the United States and the Constituent Assembly, and it has been approved by the people of Puerto Rico in a referendum called for that purpose.

e. Any change to the terms of this Covenant will have to be approved by the people of Puerto Rico in a special vote conducted consistent with its democratic processes and institutions.

f. The Constituent Assembly will not have authority to alter, modify, amend, and/or change the Constitution of the Commonwealth of Puerto Rico.

**Approved by the Governing Board of the Popular Democratic Party
On October 15, 1998**

